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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

JAMES M. BORUM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

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vs.

JAMES M. BORUM, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

THE ISSUE.

The sole issue before this court is whether a Writ of Certiorari should be granted in a personal injury action under the Employers' Liability Law where the only objection to a recovery was that the plaintiff, in order to secure employment, misstated his age.

CERTIORARI DENIED IN SIMILAR CASE.

In *Missouri Pacific R. Co. vs. Guillory.* 283 U. S. 848, 75 L. Ed. 1454, 51 Sup. Ct. 495, practically the identical question was presented to this court upon an application for a Writ of Certiorari, this court refusing to grant the Writ. We will refer to the Guillory case later under the head "Argument."

STATEMENT OF THE CASE.

The question of whether the plaintiff (Respondent here), who had lost both legs through defendant's negligence, was an employee within the meaning of the Federal Employers' Liability Law, was submitted to arbitration, pursuant to a Minnesota statute.

THE ARBITRATORS.

The arbitrators selected by the parties were Mr. M. M. Joyce, of the Minneapolis Bar, General Counsel for the Receiver of the Minneapolis & St. Louis R. Co. Mr. John P. Devaney, of the Minneapolis Bar, an attorney of extensive experience in cases involving the Federal Act, and Mr. Harry S. Stearns, of the St. Paul Bar, State Attorney for the Chicago Great Western R. Co., and State Attorney for the Chicago, Burlington & Quincy R. Co.

THE FINDINGS OF THE ARBITRATORS.

These arbitrators, representing the highest type of lawyers in the State of Minnesota, made findings of fact and arrived at conclusions of law in all things upholding the right of plaintiff to a recovery.

The essential findings of the arbitrators were as follows:

That plaintiff was employed by defendant in October, *1921,* and continued in its employment until he was injured December 11, *1928,* a period of seven years. That plaintiff was previously employed by defendant from 1911 until 1917.

That at the time plaintiff was employed in October, 1921, he was 49 years of age but in his application for employment he gave his "railroad age" which was 38 years. In his

first application in 1911, he gave his age as 28, which was his "railroad age," being 11 years under his actual age.

That plaintiff was in good health, in acceptable physical condition, performed his work satisfactorily, passed the necessary physical examination and that his application for employment was never rejected.

That there was a rule of the company that experienced persons over 45 years of age would not be taken into service. At the time plaintiff applied for employment he was 49.

That there was also a pension rule applying to employees who had attained the age of 65 years. (Such rule is of minor importance here.)

That plaintiff, Borum, was employed by defendant in interstate commerce and was an employee entitled to the benefits of the Employers' Liability Act.

That the railroad was negligent, such negligence proximately causing or contributing to his injuries.

That plaintiff's true name was at all times James M. Borum, under which name this action was prosecuted.

That neither plaintiff's age nor physical condition contributed to his injuries.

The arbitrators further found that the company had a rule reading as follows:

"*Applications* for employment in yard service *not rejected in 30 days will be considered accepted*" and that plaintiff was entitled to the benefit of this rule. Also, that his application was not rejected within the 30 day period.

The arbitrators further found in their *original* findings that the evidence as to whether defendant *knew* plaintiff's real age at the time he sought employment was so unsatisfactory that the arbitrators could not make a finding thereon (see findings of fact, Record, pages 255-256). But there was no finding that Respondent had deceived his employer.

After making the findings substantially as above set forth, the arbitrators concluded, as a matter of law, that the plaintiff was an employee within the Federal Act and entitled to recover.

SUPPLEMENTAL FINDINGS OF THE ARBITRATORS.

The railroad company, not being satisfied with the *original* findings, asked the District Court to re-commit the matter to the arbitrators for additional findings, among such requests being the following:

> "2. Whether plaintiff, at the time of making such application for employment, *knew he was ineligible* as an applicant for employment in switching service under the rules or practice of defendant and whether he made the untrue statement of his age for the purpose of securing such employment in disregard of such rule or practice" (page 258).

Upon the matter being re-committed, the arbitrators found in regard to this Request No. 2 the following:

> "2. With reference to the matters set forth in paragraph No. 2 of the court's order, the arbitrators find that the plaintiff did not know that he was ineligible as an applicant for employment in switching service under the rules or practice of the defendant; and we further find from the evidence that it was a general practice for men over forty-five years of age to state their age as being under forty-five when seeking employment of the defendant, and that the defendant was aware of such practice and that men over forty-five years had been employed by defendant in temporary service; and we further find that the plaintiff made the untrue statement of his age for the purpose of securing em-

ployment in disregard of the rule or practice heretofore designated as rule No. 16" (page 259).

The arbitrators made the following memorandum explanatory of supplemental finding No. 2:

"With reference to finding No. 2 herein it is the opinion of the arbitrators that in view of the fact that the record shows that the following testimony was given by the plaintiff: *'They were liable to hire me over the age limit, which they have done,'* and that the record further showed the defendant's witness Pagel had testified that *the practice* of men giving erroneous ages in order to obtain employment was one which was being *'done every day'* and was *a general practice* 'in this northwest territory' with reference not only to the defendant but to other railroads as well—*we could not find that the plaintiff knew he was 'ineligible as an applicant for employment.'* We assume anybody could apply for employment and would be *eligible to seek* the same. This *eligibility* of the applicant *could mature into a regular employment* even though he were over forty-five years old *if the defendant elected to waive or modify its rule.* Having made the rule, *the defendant could, of course, waive, change or abrogate it.* While being eligible as an applicant, nevertheless under the rule enforced, he would be ineligible as an employee. We regard a substantial difference existing between one's eligibility to apply for employment and one's eligibility as an employee under a rule such as here existing where the same is enforced."

It will be noticed that supplemental finding No. 2 in effect supersedes the original finding No. 9 of the arbitrators on page 256 of the Record, which was to the effect that the

evidence as to defendant's knowledge of plaintiff's age was unsatisfactory. In the supplemental finding, the arbitrators found "that plaintiff did not know he was ineligible as an applicant for employment" (page 259).

As shown by the memorandum explanatory of supplemental finding No. 2, plaintiff testified, "they would be liable to hire me over the age limit which they have done," and the witness Pagel, defendant's chief clerk, admitted that the practice of misstating their ages by employees was a general and common one in this territory. The further finding that Borum did not know he was ineligible as an applicant has reference to the statements made by Borum to different employees of defendant that he was eleven years older than his railroad age. Reference will be made to this testimony hereafter.

If plaintiff did not know he was ineligible as an applicant, he could not have been guilty of fraud in making his application.

The arbitrators further found that the defendant "having made the rule * * * could, of course, waive, change or abrogate it" (page 260). Upon the re-commitment the arbitrators again concluded that the plaintiff *was* an employee within the meaning of the Federal Act.

AWARD OF THE ARBITRATORS SUSTAINED BY MINNESOTA DISTRICT COURT.

Under the Minnesota practice a statutory arbitration proceeding, after the finding of the arbitrators, goes to the District Court for *confirmation* and entry of judgment.

Under the law in Minnesota arbitrations are favored and the award of the arbitrators will be upheld if there is any

evidence to sustain it (see decision present case, Record, pages 260-262).

The report and award of the arbitrators came before the Honorable Gunnar Nordbye, then Judge of the District Court of Hennepin County, Minnesota, who ordered that the original award of the arbitrators and the supplemental findings and award be in all things confirmed and that judgment be entered in favor of the plaintiff (Record, page 212).

The District Court had some doubt as to the rule of the company to the effect that *applications not rejected* in thirty days *should be deemed final,* and stated that he preferred to rest his opinion upon the ground that the plaintiff was in fact an employee of the company (Record, page 213, folios 638-9). The District Court differentiated the Rock case, holding that the *abhorrent fraud* and mistake as to identity in that case *was entirely different* from the present case, *where there was no fraud* and only a misstatement of age.

The District Court further said:

> "It is inconceivable to this court that Justice Butler intended to hold in the Rock case that every fraudulent violation of the rules framed for maintaining a certain standard of safety and efficiency of the employees would render such employment void and deny the defrauding employee any rights under the act. It seems quite clear that any fraud practiced by the plaintiff herein *at the most rendered the contract voidable.* It was not void. The minds of the parties met. On account of *the general practice* of railroad men falsifying their ages in order to obtain employment—which was *well known to the defendant company*—the plaintiff may not have known that he was thereby ineligible as an applicant for employment. The rule that was promulgated by the company could be modified or waived by it. How-

ever, *the defendant company intended to hire the man that it did give employment to.* He applied in person and was examined by a physician who pronounced him physically fit to work as a switchman. Men over forty-five years of age were being *retained* as switchmen by the defendant company, and it is safe to assume, with a retiring age of sixty-five, that a majority of the men, or at least a very large number of the men, who were employed as switchmen were over forty-five years of age. If the plaintiff had *commenced* working for the defendant as an experienced switchman *before* he was forty-five years of age, his employment *at the time of the accident would have been considered wholly in accord with the rules promulgated to promote efficiency and safety.* In other words, any fraud practiced by plaintiff had *no direct effect at the time of the initial employment* or at the time of the accident *upon the safety of other employees or upon the safety of the public at large.* He was a *competent employee.* There is no claim that there was any relationship between the alleged fraud and the happening of the accident. His individual employment as a switchman at his age, while a violation of the rules framed for the general object of efficiency and safety, would *in theory only* be inconsistent with and contrary to the general purposes of the Federal Employers' Liability Act" (Record, pages 214-216).

The District Court further said that *"plaintiff's status as an employee was not a peril to defendant's patrons or to its other employees"* (Record, page 216).

AWARD OF ARBITRATORS AND JUDGMENT OF DISTRICT COURT AFFIRMED BY MINNESOTA SUPREME COURT.

The Supreme Court of the State of Minnesota, being the highest court in this state, in all things affirmed the award of the arbitrators and the judgment entered pursuant thereto by the State District Court.

The Supreme Court of Minnesota did not directly pass on the question of the effect of the rule that "Applications for employment in yard service not rejected in 30 days will be considered accepted" but did say: "However, we *accept the finding of the arbitrators,* based upon the testimony of the defendant's witnesses, that the *employee became an accredited employee* at the end of 30 days."

The Supreme Court held that the so-called "public policy" which the railroad company says should prevent a recovery under the Federal Act "was a policy declared and enforced to *sustain* the rule *not* to *require its making*" (page 268). The court further made the following significant statement: "No public policy was raised by the law in aid of the public or employees to *prevent* a man from 45 to 65 *working* as a switchman if he *entered* employment at the prescribed age."

In other words, the railroad company, in one breath, made the contention that it was dangerous to the public and to other employees to have a man over 45 years of age employed as a switchman, but, in the next breath, admitted that men between the ages of 45 and 65, and *even over the age of 65, were employed* as switchmen. The company contended that if the rule as to not employing men over 45 were enforced, there would not be "so many" men in service over 45 years of age. Therefore, the contention was that the safety of the employees "and the public" would be enhanced. The evi-

dence of defendant's own witnesses showed that if an employee switchman had reached the age of 65, *he could still continue to work as a switchman until he had reached the age of 70* if he took periodical examinations and was found to be physically fit (folio 461). There was no question but that Borum was physically fit and in good condition to do his work. In fact, the chief surgeon of the company, who examined Borum, said that *he might well be taken,* and the surgeon did take him, *for a man 38 years of age* instead of 49.

After a review of the findings of the arbitrators and of the case in general, the Supreme Court of Minnesota in all things upheld the District Court and the award of the arbitrators.

As to the company's so-called "public policy," the Minnesota Supreme Court said: "The public policy effective here did not require defendant to have or enforce such a rule. It may have had none at all. * * * *It might have waived it.* * * * The public policy upon which defendant relies was a policy declared and enforced to sustain the rule not to require its making. No public policy was raised by the law in aid of the public or employees to prevent a man from 45 to 65 working as a switchman if he entered employment at the prescribed age" (page 268).

It was further stated in the opinion of the Supreme Court of Minnesota that "*It was generally known* that railway employees in order to avoid the application of an unfavorable age rule gave a wrong age" (page 268):

> "The chief clerk testified that he took his own judgment in determining age; that he did not investigate; that it was the general practice to understate ages 'in this northwestern territory.' Again he said: 'I would not say that I know it is the practice; I believe it is an

understanding.' And again: 'I think it is done every day.' The arbitrators were of the opinion that in view of the testimony of the plaintiff that the defendant was likely to hire him though over the age limit and the common practice of understating age, the plaintiff did not know that he was ineligible to apply, though if the rule were enforced he would not be eligible as an employee; and that at the end of the thirty day period he was an accepted employee" (page 268).

As to the Rock case, upon which Petitioner relies for the granting of the Writ, the Supreme Court of Minnesota said: "The Rock case *was not intended to determine against liability upon such facts as are before us*" (page 269).

THE FACTS.

The facts in this matter have been covered in a general way in the statement of the case heretofore made but some elaboration may assist the court in getting a complete picture of the situation. It will be borne in mind that *Respondent does not deny that he gave to the company* in his application to secure employment what he called *his "railroad age,"* which was eleven years under his real age.

There was no deception in this, no fraud; the company knew his age; needed men and, as stated by the Supreme Court of Minnesota: "Times were brisk and the defendant needed men. Plaintiff had worked for it for six years some time before. He was a satisfactory worker. It was glad to have him back. It just about knew that his age was suspicious. It could have found it readily. It investigated him in other respects for five years back. The question of his age did not trouble" (pages 264-265).

In the testimony of Borum there was a refreshing frank-

ness. *There was no attempt at deception.* James Borum first went to work for the Soo Line in 1911. At that time he gave his "railroad age" (folio 101).

"Q. What do you mean by 'railroad age'?

A. Well, as a rule, you go to work on account of the age limit. I was told before I went to work for the Soo Line, that the age limit was thirty-five years, so I went to work at my railroad age, twenty-eight in 1911" (folio 101).

Before Borum went to work he had a talk with one Danforth, a yard master who had charge of the company yards at Shoreham in Minneapolis. *Borum told Danforth that his "railroad age" was 39, which was 11 years under his real age* (folio 111).

"Q. What did Mr. Danforth say to you?

A. He said, 'I will give you a slip—I will go down and see what I can do.'

Q. Did he hire you that day?

A. No.

Q. Did he say what he was going to do?

A. He said he would go down and see the superintendent" (folios 111-112).

After this conversation Borum got the slip, saw the clerk who did the employing and this *clerk told him that he thought he was too old.* We quote from the testimony of Borum:

"A. I gave him the slip, and filed an application as switchman. He got out a lot of papers, he asked what my age was, and I told him, *'My railroad age was thirty-nine,'* and he says, *'I think you are too old,'* and he sent me down to the superintendent.

Q. Did you go to see the superintendent?

A. I went to see the superintendent.

Q. Did you tell the superintendent that you were making application for work?

A. I did.

Q. What occurred there?

A. I told the superintendent—

Mr. Palmer (interrupting): The same objection is made to that. It will be understood that it is taken subject to our objection and exception.

Mr. Joyce: Yes.

Q. Just tell what talk you had with the superintendent.

A. I told the superintendent what I was there for, that I filled out an application for switchman, and *I told him that the clerk told me that he thought I was too old,* and he asked me my age, and *I told him my railroad age was thirty-nine,* and he said, *'We need men,'* and *he told me to go back up and fill out the application.*

Q. Did you go back to the clerk?

A. I went back to the clerk.

Q. Did you fill out the application?

A. I did.

Q. Did you have a talk with the clerk when you filled out the application?

A. Yes, I told him the superintendent sent me back.

Q. What did he say to you about filling out the application—the clerk?

A. He said, *'Just fill it out as near as you can, like you did the first one'"* (folios 40-41).

By "the first one" mentioned in the quotation above was meant the first application Borum made for employment, in

which he had stated his "railroad age" instead of his real age, the "railroad age" being eleven years under his real age.

Borum resorted to no fraud, to no deception. He always went under his true name, James Borum (folio 123). He gave his "railroad age" to yardmaster Danforth (folio 111) and after the employing clerk Pagel had expressed some doubt as to Borum's age, Borum went to see the superintendent, who sent him back to the clerk and Borum then made out his application for employment and the clerk told him, "Just fill it out as near as you can like you did the first one" (folio 121).

Borum did this, then went to Dr. Rishmiller, the chief surgeon of the company, submitted to a complete physical examination, passed that examination, which disclosed him to be in good physical shape, agile, able to climb cars and to do the work of railway switchmen generally (folios 124-129). The company physician accepted Borum's age as 38 when he was in fact 49 and admitted that "He had the appearance of a robust, strong man thirty-eight years of age" (folio 358).

Borum testified:

"A. I was just as supple as any young man they got over there now.

Q. At the time they told you they needed men to work there, was there considerable work in the Shoreham Yards?

A. Yes.

Q. Did you work quite regularly then for a while?

A. Yes, sir.

Q. As switchman?

A. As switchman.

Q. That was in 1921?

A. Yes, sir.

Q. Did you continue to work with the Soo Railroad from 1921 up until the time of your injury?

A. Yes, sir" (folios 43-44).

The yard foreman Danforth admitted: *"I know I told him that I could use men because I was short of men at that time"* (folio 103).

AS TO DEFENDANT'S KNOWLEDGE OF BORUM'S AGE.

Borum told the yardmaster, Danforth, that his "railroad age" was eleven years under his real age (folio 111). When he first applied for employment to the yardmaster, he was asked relative to his age and Borum said:

"A. I told him my age limit, my railroad age is 39.

Q. Did you say anything else to him?

A. *I told him I was 11 years under my real age.*"

Following this and *after Mr. Danforth had the knowledge which Borum's testimony shows,* Danforth gave Borum a slip and sent him to the employing officer, the chief clerk, and also told Borum he would see the superintendent and see what he could do about giving him a job. Later on, Danforth gave Borum a slip, told him things were "all right" and that he should see the chief clerk (folio 114). The chief clerk suggested that Borum was too old but finally accepted him.

It is to be borne in mind that Borum worked regularly from 1921 when he was employed up to the time of his injury in 1928 (folio 130).

As to the term "railroad age" Borum testified:

"Q. Now, in reference to the term 'railroad age,' what do you mean by 'railroad age'?

A. Well, it is a habit—it has always been the custom, and we all know it; a man hardly ever goes to work on his right age, with the railroad.

Q. Why not?

A. On account of the age limit" (folio 152).

As to employees giving the wrong or the "railroad age" the following appears from the examination of the witness Pagel by M. M. Joyce, one of the arbitrators:

"Mr. Joyce:

Q. In the light of your experience in the employment bureau, do you know of, or *is it a general practice of the men, giving an age other than their actual age,* for the purpose of employment on the Soo Line?

A. On the Soo Line?

Q. Yes.

A. I believe I will have to have that again.

(Previous question read.)

A. That is a general question, is it?

Q. Yes. Are you familiar, or is there such a practice, to your knowledge, of the men, in an effort to escape the rigor, possibly, of the limitation of forty-five years?

A. I believe there is; *I think it is quite general*" (folios 489-490).

On cross examination of this witness by counsel for plaintiff, the following appears:

"Q. This practice which Mr. Joyce asked you about, of men giving younger ages when they were old, and older ages when they were young, *you knew it existed practically all the time that you have worked for the Soo Line?*

A. *I know it is a general practice, yes*" (folio 493).

The testimony further discloses:

"Q. You know that *that is the general practice* in this northwest territory, and that is where you have been working for the last seventeen years?

A. *Yes, sir.*

Q. (Continuing)—for men to give ages younger than they are, when seeking employment on the railroads?

A. I would not say that I know it is the practice, I believe it is an understanding.

Q. Didn't you state to Mr. Joyce that that is a practice that you knew existed among the railroad men, to a large extent, and it was a practice?

A. *I think it is done every day, yes.*

Q. *You think it is done every day?*

A. *Yes.*

Q. In spite of the fact that you knew that—and you knew it, of course, in 1921, while you were in that department?

A. Sure.

Q. In spite of the fact that you knew that, as I understand you, you had made no investigation with reference to his age, had you?

A. I would have no occasion to.

Q. You made no investigation as to his age?

A. I did not make any investigation" (folios 503-505).

Bearing in mind that this was a statutory proceeding and that the judgment based on the award of the arbitrators, under the Minnesota practice, is to be sustained if there is any competent evidence to uphold it, there can be little question but that *the knowledge of the company as to Borum's age as* appears from what has been heretofore quoted *pre-*

cludes any idea of fraud. The award of the arbitrators and the judgment of the District Court, affirmed by the Supreme Court of Minnesota, can only be set aside if there is no evidence to sustain it.

It is, of course, a fundamental that fraud cannot be presumed. It must be proven. It must be shown. In this case, not only is there *a failure of proof of fraud,* but even the evidence on the part of the company *negatives* the idea of fraud.

There could be no fraud unless the company believed Borum to be 38 years of age when he applied for employment, instead of 49. This is the sole basis for defendant's claim. *If the evidence does not require a* finding of fraud on this question, the company's contention fails. The evidence would not *permit,* much less *require,* a finding of fraud by the arbitrators. The yardmaster Danforth, the first man consulted as to employment, was told by Borum that his "railroad age" was different from his real age. Ultimately, the yardmaster sent Borum, despite this knowledge, to the chief clerk, who was in reality the employing officer. Yardmaster Danforth said, "I know I told him that I could use him *because I was short of men at that time*" (folio 309).

Then, after Borum got to the chief clerk who had first told Borum that he thought he was too old (folio 118), the clerk sent Borum to the superintendent and the superintendent said, "We need men" (folio 120), and Borum went back and filled out the application "like you did the first one" (folio 121).

Where was the fraud? Danforth, Schutt, the superintendent, and the chief clerk Pagel *were all aware of the fact that Borum used his "railroad age."* If they knew this, *there could be no fraud.* The *only* claim of fraud is misstatement of age.

The arbitrators, on the motion to re-commit, filed a memorandum which has been heretofore referred to. In this memorandum the arbitrators stated that there was evidence to the effect that the practice of giving erroneous ages was common in the Northwest, was a general practice, and that the defendant having made a rule could waive, change or abrogate it (pages 259-260).

In the opinion of the Supreme Court of Minnesota, it was said:

> "The chief clerk testified that he took his own judgment in determining age; that he did not investigate; that it was the general practice to understate ages in this northwest territory" (page 268).

Taking the testimony of Borum as to his first talk with yardmaster Danforth regarding his age; that he went to the employing clerk who suggested he was too old; that he went to the superintendent; that the company needed men and that he was sent back to the employing clerk; that the clerk then told him to make out his application the same as he made out the first one when he had given his "railroad age" —*this evidence was certainly sufficient to sustain the award of the arbitrators to the effect that there was no such fraud on the part of the plaintiff Borum as to deprive him of the status of an employee.*

In this connection it is to be borne in mind that, under arbitration proceedings in Minnesota, *if there is any credible evidence* to sustain the award of the arbitrators, it will not be disturbed.

In order to deprive Borum of a recovery in this case, the court would have to hold that despite the evidence heretofore referred to, *showing the company's knowledge of the situation,* the mere fact, standing along, that Borum had mis-

stated his age 11 years would constitute a fraud, which would deprive Borum of the status of an employee. Such finding would have to be made *despite the abundant testimony that the company was fully aware of the facts at the time it hired Borum.*

It is doubtful if a finding of fraud could possibly be sustained under the meager testimony as to fraud in this case. Be that as it may, *clearly the evidence does not require a finding of fraud,* as a matter of law, in view of such testimony and in view of the finding of the arbitrators, the triers of fact, the finding of the Minnesota District Court and the holding of the Supreme Court of Minnesota.

THE THIRTY DAY RULE.

Reference has heretofore been made to the so-called thirty day rule applicable to defendant's employees, including plaintiff. This rule, which we will again quote for the convenience of the court, reads as follows: "Applications for employment in yard service *not rejected in thirty days will be considered accepted.*" The application of Borum was not rejected at any time.

The arbitrators, in their findings of fact, held: "That thirty days after entering defendant's service the status of the plaintiff became fixed as an employee and he was immune from discharge on anything in connection with the application" (see finding quoted in opinion of Minnesota Supreme Court, Record, page 256).

In speaking of the finding of the arbitrators in this connection, the Supreme Court of Minnesota said:

> "In short, they found that *he was an employee* within the act. The evidence of two witnesses for the de-

fendant, who were engaged many years in connection with the hiring of employees for the defendant, put this interpretation upon the rule. There was no testimony opposed" (page 262).

The yardmaster Danforth testified:

"Q. Well, as I understand it, if he was to be rejected, he would have to be rejected within thirty days from the time of his application?

A. Yes, sir" (page 263).

The employing clerk Pagel testified:

"Q. At the end of thirty days, under article 22, he would then be immune from discharge, except for a violation of the rules and a hearing, would he not?

A. HE WOULD BE IMMUNE FROM DISCHARGE ON ANYTHING IN CONNECTION WITH THE APPLICATION.

Q. On anything in connection with his application?

A. Yes, sir.

Q. As I understand it, at the end of thirty days, *his status as an employee of the railroad company would become fixed,* and he could not lose that employment because of anything that occurred in the application; that is correct, isn't it?

A. *Yes, sir*" (page 263).

We quote the following from the testimony given by chief clerk Pagel:

"Q. If he had made any misstatements otherwise than as to his age and his place of birth, for instance, if you had made an investigation, you could have readily found that out in less than thirty days, couldn't you?

A. I presume so.

Q. And you made no effort to do that?

A. No, sir" (page 264).

This witness Pagel also admitted that he at times would employ a man who was over the age limit and that before the thirty day period had expired he would take him out of service (see testimony quoted opinion Minnesota Supreme Court, Record, page 264).

The Supreme Court of Minnesota stated that it might be that under the Rock case this rule was not of importance but "*We accept the finding of the arbitrators based upon the testimony of defendant's witnesses that the employee became an accredited employee at the end of thirty days*" (page 264). (Such "finding" is final under the rule laid down in *Mpls., St. P. & Sault Ste. Marie Ry. Co. vs. Moquin*, 51 Sup. Ct. 501; 283 U. S. 520.

ARGUMENT.

Under the head of "The Facts" above, argument and facts have almost inevitably been mixed. In fact, little is needed by way of argument in view of the evidence.

The railway company bases its claim solely on the decision in the case of *Minneapolis, St. P. & S. S. M. R. Co. vs. Rock*, 279 U. S. 766, 49 Sup. Ct. 463.

The Rock case will be distinguished hereafter. It has no application to the facts in this case as will be apparent from a mere reading of what has heretofore been said.

THE GUILLORY CASE.

In *Missouri Pacific R. Co. vs. Guillory*, 283 U. S. 848, 75 L. Ed. 1454, 51 Sup. Ct. 495, practically the same question was raised as is raised in the case at bar. In the Guillory

case this court refused to grant a Writ to review the decision of a Texas court. In the Guillory case the chief contention of the railroad company was that the case came within the Rock decision. We quote from the Petition for Writ of Certiorari made by the railroad company in the Guillory case its Point One:

> "The Court of Civil Appeals erred in holding that the District Court did not commit error in refusing to give in its charge to the jury the peremptory instruction requested by this Petitioner, which was defendant in the District Court, when the *undisputed* evidence showed that the plaintiff in his application for employment (upon which he was employed by the defendant and during the course of which employment the alleged injury to plaintiff occurred), *over his admitted signature, stated that he was thirty-four (34) years of age,* when a rule of the defendant contained in the application for employment, signed by plaintiff, provided that no person inexperienced in railway work over thirty-five (35) years of age and no experienced person over forty-five (45) years of age should be taken into the service, and *the age of the plaintiff at the time of the signing of the application for employment was forty-seven (47) years* as shown by the *undisputed evidence* upon the trial of the case, and therefore plaintiff was not entitled to a recovery for his alleged injury in his suit brought under the Federal Employers' Liability Act (U. S. Code Annotated, Title 45, Section 51, *et seq.*)."

An attempt is made in the Petition for Certiorari herein to distinguish the Guillory case for two reasons: First, because Guillory was working about a bridge. This conten-

tion is puerile in view of the fact that an employee working in connection with a bridge used in interstate commerce is within the act. *Pederson vs. Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125. We will not further discuss this point.

The next contention is that the Guillory case should not be considered as a precedent for denying the Writ because in that case the jury found as a fact that Guillory did not misrepresent his age. There was such a finding in the Guillory case and the jury did make answer to a question as to misrepresentation, saying Guillory had not misrepresented his age. The *facts* were, *and this without dispute,* that Guillory was forty-seven (47) years of age but that he stated in applying for employment that he was thirty-four (34) years of age. The undisputed facts, therefore, were that there *was* a misstatement of thirteen years as to his age.

The point as to misstatement of age was presented in the Guillory case.

If, however, the finding of the jury that he did not misrepresent his age be taken as a distinguishing point, then we have in the present case, *in effect, the same sort of finding.* We have a finding here by the arbitrators that there was no such fraud as to deprive Borum of his status as an employee—in other words, no misrepresentation. We have evidence by Borum that his employing officers knew his true age; the facts and circumstances corroborate his testimony and the finding of the arbitrators, who occupied the same position as a jury, negatived any fraud or misrepresentation sufficient to deprive Borum of his status as an employee. It will be seen, therefore, that the record in behalf of Borum was stronger than the record for the plaintiff in the Guillory case.

Furthermore, we have the thirty day rule in this case which was not involved in the Guillory case, nor in the Rock case.

If there be any distinction between the facts in the present case and the Guillory case, it is all in favor of the plaintiff Borum in this case and in view of the fact that a Writ was not granted in the Guillory case, it certainly should not be granted in the present case. The "finding" of the Minnesota Supreme Court is final, under the Moquin decision, *supra*, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

THE ROCK CASE.

The Rock case has heretofore been referred to and we will give a very brief analysis of the opinion in that case. One of the first things to be considered is that there *was deception, deceit* and *fraud* in the Rock case, whereas, *in the present case there was no fraud or no deceit.* There was evidence in the case which would justify a finding that there was no misrepresentation on the part of Borum, the company knowing that his "railroad age" and his actual age differed greatly.

In the Rock case the respondent's name was *Joe* Rock. He obtained employment with the Soo by representing that he was *John* Rock.

Joe Rock applied for a position and was sent to defendant's physician for a physical examination. He had been treated for *ulcers* of the stomach, his *appendix* had been removed, and he had a *rupture.* His application was *rejected because of his physical condition.* In other words, the man who applied for the job was rejected because he *could not pass the physical examination.*

Later, the same *Joe* Rock, representing himself to be

John Rock, applied for employment. The *Superintendent* of the railway company was *deceived* as to the *identity* of *John* Rock and accepted him for employment. He was required, however, to take a physical examination.

Joe Rock *had already been once rejected* because of physical unfitness. He procured a man by the name of Lenhart to *impersonate him*, the said Lenhart calling himself *John* Rock. Lenhart *was physically examined* and found to be in such condition that he *could* be accepted as an employee. Because of this *deception* as to the *identity* of *Joe* Rock, because of the later claim that *Joe* Rock was *John* Rock, because Lenhart was induced to impersonate the applicant and submit to a physical examination, and because *Joe* Rock *was physically unfit to become an employee* of the railway company, it was *deceived* into giving *Joe* Rock employment.

The Supreme Court of the United States said that the railroad company had the right to require applicants to pass a physical examination. *Joe* Rock had not passed such physical examination. His physical condition was such that his application would have been rejected.

By his deception he set at naught the company's rules requiring men to be physically fit, as stated by the Supreme Court. The Supreme Court further said that such *deception* and securing of employment by the unfit was opposed to public interest and would embarrass the carrier in the performance of its duties to the public.

In stating the reasons for rejecting the claim of Rock, who was injured under circumstances creating a liability, Mr. Justice Butler said: "It was at all times his duty to *disclose his identity* and *physical condition* to" the railway company. It was further said that "as a result of his concealment his status was at all times wrongful and a fraud

upon the railway company." This was the basis of the decision.

In other words, *deception and fraud* constituted the entire basis for holding that Joe Rock was not an employee within the Federal Act.

He deceived the railway company:

1. As to his *identity.*
2. As to his *physical condition.*
3. By securing one *Lenhart* to take *a physical examination* for the *alleged John* Rock, who was in fact *Joe* Rock.

The misrepresentation, deceit and concealment continued during his employment.

THE BASIS OF THE DECISION.

The Rock case is based on fraud and deception. It is stated in the syllabus that where a railroad employee obtains his position *"by means of deception and fruad,"* he cannot come within the Act.

In the Rock case, there was *deception* from the very start. There was *a rejection of the applicant* because of his physical condition. There was a *substitution* of still *another person* to take the *physical examination* for the alleged John Rock. The Supreme Court was very careful to point out in its opinion that the railway company was deceived as to the *identity* and *physical condition* and that because of this deception, employment was secured.

Mr. Justice Butler said:

> "It was at all times his duty to *disclose his identity and physical condition* to petitioner."

Borum did not hide his identity. He submitted to a physical examination. He was able to do his work properly.

The Rock case was never intended to apply to a case of *mere misstatement of age.* If so, a misstatement of a day or a month might deprive an employee of a right of recovery. In the brief of Petitioner, it is admitted that the misrepresentation must be substantial. Misstatement of days, months or years would not be substantial and would be of little consequence unless, because thereof, something in the employee's condition, due to his age, contributed to his injury. *It was specifically held by the arbitrators in this case that the work of Borum was satisfactory and "that neither his age nor the physical condition of the plaintiff contributed to his injury"* (Record, page 256).

NO FRAUD—NO MISREPRESENTATION.

Under the finding of the arbitrators, *based upon credible evidence, there not only was no fraud* but there was no real misrepresentation of age in this case. There was a *misstatement* of Borum's age, his "railroad age" being eleven years under his real age. Under the evidence the arbitrators could and did find that *there was not sufficient evidence of fraud or misrepresentation* to deprive him of his status as an employee.

If, under the Minnesota practice, there is *any evidence to sustain the award of the arbitrators,* it will not be disturbed. The District Court and the Supreme Court of the State both sustained the award and we submit that no question is now presented to require this court to grant the Writ sought.

CONSIDERATION OF THE PETITION FOR CERTIORARI.

Under the heading "Summary Statement," it is said by the railroad company that Borum was employed because he "falsely" pretended that he qualified as an employee. From what has heretofore been said, it is clear that this statement is not correct. It is, in effect, negatived by the finding of the arbitrators and the courts which upheld such finding. It is further said, under the same heading, that after Borum brought the suit "Petitioner *then* discovered the deception which Respondent had practiced." Under the evidence heretofore referred to *the railroad company knew of Borum's age from his statement to the yardmaster Danforth*, to the Superintendent and to the employing officer Pagel. Furthermore, the custom of misstating age was a general one, which was well-known to defendant, as admitted by its chief clerk Pagel.

An extremely misleading statement appears on page 6 of the Petition. We do not believe that such a misleading statement to this court on a Petition for Certiorari should go unchallenged. It is stated with reference to Borum: "He never told anyone connected with Petitioner his true age up to the time of the accident." To sustain this, Record, page 79 is quoted, reference undoubtedly being to folio 236, where a leading question on cross examination by railway counsel would justify this statement. However, on re-direct examination it appears that the witness did not have in mind his talk with the yardmaster Danforth in making this answer. The Record shows the following as to Borum's conversation with Danforth:

"By Mr. Davis:

Q. What else did you say, if anything, about your age?

A. I told him my age limit, *my railroad age is thirty-nine.*

Q. Did you say anything else to him?

A. *I told him that I was eleven years under my real age*" (folio 111).

On re-direct examination of Borum, the following took place:

"Q. Mr. Palmer asked you the question, if, when you made these statements, you stated to anybody connected with the Soo Line any different age than your railroad age, and you testified that you did not in response to that question. But you also testified that you told Mr. Danforth that you were eleven years older than your railroad age. When you answered him 'No,' did you understand that he had any reference to Mr. Danforth at all?

Mr. Palmer: That is objected to. He did not testify that he told Mr. Danforth any number of years difference in his age.

Mr. Stearns: I don't think he testified that he told Mr. Danforth his true age.

Mr. Davis: I think if you will go back in the record, you will find that he testified that he said he was eleven years—that his true age was eleven years more than his railroad age.

Mr. Joyce: I have the notes here on that, that he told him that he was eleven years older than my railroad age.

By Mr. Davis:

Q. *Did you tell Mr. Danforth that?*

A. *Yes.*

Q. When you answered Mr. Palmer's question, you did not have reference to Mr. Danforth?

A. No" (folios 285-287).

The testimony of Borum on direct examination, taken from page 37 of the Record, folio 107, is as follows:

"Q. Did you say anything else to him?

A. *I told him I was eleven years under my railroad age*" (folio 111).

Under the heading "Argument" and on page 9 of the Petition in reference to the Guillory case, Petitioner says: "No fraud being established the principle of the Rock case did not apply."

There was no fraud in the case at bar. Fraud was not established as a matter of law, and in view of the evidence of Borum that defendant *knew his real age,* in view of the evidence of defendant's chief clerk that men *customarily gave their "railroad age"* instead of their real age, in view of the *finding of the arbitrators* that there was no fraud sufficient to deprive Borum of his status as an employee, which was sustained by the courts, how can it be said that fraud has been established as a matter of law? And all the time it must be borne in mind that *if there is any evidence to sustain the finding of the arbitrators,* under the Minnesota practice, the award will be upheld.

Another misleading statement appears in the Petition for the Writ at page 15 as follows: "Indeed Petitioner had to employ lawyers in Illinois where Respondent was born and they had to resort to the family Bible in order to ascertain the true date of his birth when it was ascertained after this suit was begun that he had falsified his age." To sustain this statement, the testimony of John E. Palmer, one of

counsel for the railroad company, is referred to on page 189 of the Record.

There was *no attempt at deception* by plaintiff Borum. He testified on direct examination that he gave his "railroad age," *i. e.,* his date of birth as 1883 (folio 122). In answer to a question by arbitrator M. M. Joyce, he stated that he actually was born in October, 1872 (folio 148). *There is no evidence of any deception whatever.* In fact, *in the Reply in this case,* appearing at pages 14 to 17 of the Record, *it was specifically alleged that Borum's age was more than thirty-nine (39) when he secured his employment* and that *"plaintiff and defendant both fully understood and agreed that plaintiff's age was more than thirty-nine years, but that at the instance and request of defendant, this plaintiff did state his age to be thirty-nine years* at the time of so securing such employment."

It will be remembered that the employing clerk, Pagel, told Borum to fill out his application the same as he did the first one in which his "railroad age" was given, being eleven years younger than his real age. The statement that the company had to employ lawyers in Illinois to ascertain the date of Borum's birth seems doubtful. *The Reply admitted that his age as given in his application was different than his actual age* and there never was any controversy as to his real age.

On pages 18 and 19 of the Petition, it is in substance stated, in effect, that the purpose of the Employers' Liability Law was to make interstate commerce safer and that the real object of the law was *not* to provide compensation for injured men.

This point needs little argument. However, a reference to proceedings preliminary to the passage of this act, together with the various Safety Appliance Acts by Congress,

will clearly show that the object was to prevent great loss of life and limb to railroad employees.

When the Employers' Liability Law did away with the fellow-servant rule, it was not for the purpose of making interstate commerce safer but it was for the purpose of providing compensation for injured employees. When contributory negligence was done away with as an absolute defense, it was for the purpose of aiding the employees in obtaining recovery in case of injuries. When assumption of risk was done away with in cases of statutory violation, this was also for the benefit of employees. Further discussion as to the purpose of the Act is unnecessary.

CONCLUSION.

While we realize that the failure to grant a Writ of Certiorari in the *Guillory Case*, 283 U. S. 848, does not import an opinion by this court as to the merits of that case, nevertheless, if under the facts as they there appeared, a Writ should not have been granted, clearly it should not be granted in this case, where the evidence is *stronger in plaintiff's favor* than it was in the Guillory case.

This case does not involve fraud. It merely involves a misstatement of age made by Borum when he sought employment, after which he worked for the company for seven years. The case is not governed by the Rock case. Congress never intended that such a mere misstatement could deprive an employee of his status as such. Should this court hear this case on the merits it could only decide that the arbitrators and the Minnesota courts were correct in holding that Borum was an employee within the Act.

No matter of great public interest or concern is involved. The courts, with a practical unanimity, have held that such

minor misrepresentations could not defeat a recovery. (*Payne vs. Daugherty,* 283 Fed. 353.) The granting of the Writ would determine no question of law that has not, in effect, been previously determined. It would merely result in delaying compensation to a man who lost both legs through the negligence of his employer.

The evidence fails to show fraud as a matter of law. *There is evidence to sustain the finding of the arbitrators* and the judgment of the Minnesota courts. No reason has been shown for this court to take jurisdiction of this cause and the Petition for the Writ should be denied.

Respectfully submitted,

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